

single EEO program. Church Ex. 7, p. 10; Church Ex. 7, Att. 7. The committee felt that because of the similarity in purpose of the two radio stations, and because of their affiliation with The Lutheran Church/Missouri Synod, a single EEO program would suffice. Devantier recalled that after the Standing Committee meeting he discussed EEO compliance with Lauher, but could not recall the specifics of their discussion. Tr. 855-57.

47. Lauher's employment with KFUD was involuntarily terminated in July 1989. According to Lauher, his termination had nothing to do with his EEO efforts but related to KFUD-FM's failure to meet sales expectations. After Lauher's departure, Rev. Devantier acted as general manager of KFUD-FM. Church Ex. 6, p. 3; Tr. 191, 615-16.

#### Filing of Petition to Deny

48. On January 2, 1990, the Missouri State Conference of Branches of the NAACP and various local branches of the NAACP (collectively, "the NAACP") filed a Petition to Deny the applications for renewal of license of four stations including KFUD and KFUD-FM. In its petition, the NAACP stated that the stations subject to its petition "had no more than token employment of Blacks and other minorities during the license term." It also accused the stations of not operating under meaningful EEO programs and not proposing meaningful EEO programs

for the coming 1990-96 renewal term. MMB Ex. 3.

#### Subsequent Recruitment Efforts

49. In January 1990, after the NAACP had filed its petition to deny, the stations made a concerted effort to hire minorities. In part, this effort was a result of the petition to deny having been filed and, in part, a result of the stations having begun to recruit more aggressively for job openings. In January 1990, the Church actively recruited African Americans for the positions of secretary/receptionist and maintenance worker by advertising in a number of newspapers with circulation among African Americans. They also placed advertisements in the St. Louis Dispatch and contacted the Lutheran Employment Project. The Lutheran Employment Project is an organization which seeks to gain employment for minorities. Nearly all of the applicants for these two positions were African American. As a result of this effort, two African Americans, Bridget Williams and Timothy Meeks were hired. Church Ex. 4, Att. 6, p. 8; Tr. 516, 539.

#### Classical Music Requirement

50. In March 1983, one month after the beginning of the license term, the Church decided it would need to accept commercials on KFUD-FM. Voluntary contributions and bequests were insufficient to support operation of the stations. Church

Ex. 7, p. 5. Between 1983 and 1986, KFUE-FM did not hire its own sales staff but instead relied on Concert Music Broadcast Sales ("CMBS") to do both local and national selling. CMBS was a sales representative firm based in New York which specialized in spot national sales for commercial classical music radio stations throughout the United States. Church Ex. 4, Pp. 9-10.

51. On September 29, 1986, KFUE-FM hired its first sales person, Jan Hutchinson. Church Ex. 4, Att. 6. Hutchinson had been an employee of CMBS and transferred to KFUE-FM when CMBS's contract with the station expired. Tr. 220-26. As its first sales manager, KFUE-FM hired Bern Hentze. Hentze had also been an employee of CMBS. In hiring Hentze, Stortz operated on the premise that people with knowledge of classical music would make the best salespeople because they would know the product they were selling. According to Stortz, because of economic pressures and rapid turnover of personnel, the stations at times had to hire people with less knowledge of classical music than the station would have liked. To the best of Stortz' knowledge, however, no minority applicant was ever rejected for a position at KFUE-FM because he or she lacked knowledge of classical music. Church Ex. 4, p. 10.

#### Mitigation

52. The Church recognizes that it should have done more

active recruiting of minorities earlier in its license term. Stortz claims that this was made difficult by the stations' difficult financial position. According to Stortz, during the first years of the license term, lack of resources meant that the stations did little advertising for positions. During this period the stations relied more on referrals from existing employees. In addition, Concordia seminary supplied some applicants and the Lutheran Church may have sent some.<sup>7</sup> Stortz also contends that the formation of a consistent program of minority outreach was hindered by a high turnover in the general manager positions. Church Ex. 4, p. 11; Tr. 485.

#### Representations to the Commission

##### Number of Job Hires

53. Paula Zika has worked for the stations since 1971 and has been the stations' Director of Business Services since the mid-1980's. Her responsibilities include record keeping. Church Ex. 3, p.1; Tr. 325-26.

54. At Dennis Stortz's direction, Zika prepared the 1989

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<sup>7</sup> During the license term, the stations first recruited from a source other than those identified by Stortz in September 1985, when they placed an advertisement in the St. Louis Dispatch for a business manager. The next use of a source other than those identified by Stortz occurred in January 1987 when the station placed an advertisement in Broadcasting Magazine for a sales worker. Church Ex. 4, Att. 6, Pp. 1-3.

renewal application for KFUD and KFUD-FM. Using the stations' 1982 renewal application as a model, Zika drafted the EEO Program Report, and Stortz reviewed it. Therein, Zika included information which she had collected regarding job hires within the twelve month period ending September 10, 1989. According to that data, the stations had hired a total of six persons, two white males and four white females. Church Ex. 3, p. 1; Church Ex. 4, p. 16; Tr. 326-30, 332-33.

55. After reading the EEO Program Report drafted by Zika, Stortz did not ask Zika about the information on "Job Hires." He was aware that, in completing the renewal application, Zika had reviewed the employment records which she kept. Upon completion of the renewal application, it was forwarded to Rev. Paul Devantier, the Executive Director of the Board for Communications Services of the Church (and a former General Manager of KFUD) so that he could have it signed by the Rev. Ralph A. Bohlman who was then President of the Church. Thereafter, on September 29, 1989, the KFUD and KFUD-FM renewal application was filed with the Commission. Church Ex. 4, p. 19; Church Ex. 4, Att. 16.

56. In December 1989, Stortz assisted the Church's communications attorney, Marcia Cranberg of Arnold & Porter, in preparing a Supplement to the renewal application. It was filed on December 29, 1989. That Supplement repeated the claim contained in the renewal application that during the twelve month

period ending September 30, 1989, the stations had hired a total of six persons, two white males and four white females. Church Ex. 4, Att. 16, p. 7; MMB Ex. 2, p. 5.

57. On January 2, 1990, the NAACP filed its petition to deny the renewal application. MMB Ex. 3. By letter dated January 4, 1990, Glenn Wolfe, Chief of the Mass Media Bureau's EEO Branch, sought further information concerning job hires at KFUD and KFUD-FM during the time period from October 1, 1986 to October 1, 1989. MMB Ex. 4. At the direction of Rev. Devantier, Stortz and Zika gathered the information requested and sent it to Marcia Cranberg for inclusion in the Opposition to Petition to Deny and Response to Inquiry filed with the Commission on February 23, 1990 ("Opposition"). Church Ex. 3, p. 2; Church Ex. 4, p. 20; Church Ex. 4, Att. 7.

58. The information submitted with the Opposition included, at Table Three, data on job hires resulting from a new review of station records undertaken by Stortz and Zika. Church Ex. 4, p. 20; Church Ex. 4, Att. 7, p. 26. When Table Three was compiled, neither Stortz nor Zika noticed any discrepancy between the number of job hires reported therein and the number of job hires in the EEO Program Report submitted with the stations' license renewal application. Church Ex. 4, p. 20.

59. More than two years later, in a letter dated June 26,

1992, the Commission sought clarification as to why the renewal application referenced six hires during the October 1, 1988 to September 30, 1989, time period, while the February 23, 1990, Opposition indicated that there had been fourteen hires (ten full-time and four part-time) during that time period. MMB Ex. 8; Church Ex. 4, p. 21. Upon receipt of the Commission's 1992 letter, Stortz discussed the apparent discrepancy with Zika, in an attempt to ascertain the reason for it. Church Ex. 4, p. 21; Tr. 334-35.

60. According to Zika, two misunderstandings accounted for six of the eight discrepancies between the hires reported with the stations' renewal application and the hires reported in response to the Commission's January 4, 1990, letter. First, in preparing the hiring data, Zika interpreted the questions in the renewal application and in the January 4, 1990, letter differently. The renewal application sought the stations' "total hires." Zika understood this to mean full-time hires, and only those full-time hires that were still with the station when the renewal application was prepared. This being the case, Zika did not include two employees who had been hired during the preceding year, but had left before she prepared the renewal application. The January 4, 1990, letter from the Commission, on the other hand, asked for information concerning "each position filled" between October 1, 1986, and October 1, 1989. In preparing data for responding to this letter, Zika included those two hires.

Second, in determining "total hires" for the renewal application, she did not count part-time hires of which there were four. In providing information on "each position filled" in response to the Commission's January 4, 1990, letter, she included these part-time hires. Church Ex. 3; Church Ex. 4, p. 23; Church Ex. 4, Att. 7; Church Ex. 9; MMB Ex. 4; Tr. 334-36, 341.

61. In addition to the above discrepancies, Zika failed to include Rev. David Schultz among the hires in the renewal application prepared in September 1989, because Schultz, although hired in late September 1989, did not appear at the stations until October 1, 1989. Consequently, Zika did not know that he had been employed in September and should have been included among the hires reported in the renewal application. He was, however, listed in the Opposition prepared later, in February 1990. Church Ex. 3, p. 4 ; Church Ex. 4, p. 23-24; Tr. 338-39.

62. Another full-time employee listed in Table Three of the Opposition who was not included in the six hires referenced in the renewal application's EEO Program Report was Bob Thomson, a sales worker hired on October 24, 1988. The stations did not have computerized employee records during the license term, and Zika simply did not recall that he had been hired. Therefore, he was inadvertently not included among the job hires in the renewal application. As a result of a review of payroll records by Stortz and Zika in preparing the Opposition, Thomson was listed



in Table Three thereof. Church Ex. 3, p. 4-5; Church Ex. 4, p. 24; Tr. 339.

#### Recruitment

63. In the EEO Program Report accompanying the 1989 renewal application for KFUD and KFUD-FM, the Church made the following statement, inter alia, under the heading "Recruitment":

When vacancies occur, it is the policy of KFUD and KFUD-FM to seek out qualified minority and female applicants. We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. We contact the various employment services and actively seek female and minority referrals and we specifically request them to provide us with qualified female and minority referrals. See sample reply form attached.

Church Ex. 4, Att. 16, p. 6.

64. Stortz reviewed a draft of the above statement along with the rest of the EEO Program Report which Zika had drafted using the 1982 EEO Program Report as a model. He decided that the first sentence needed no changes. According to Stortz, the statement was accurate because at that time the stations generally sought qualified minorities and females for openings on their staff. Stortz believed that the stations' financial ability and general efforts to recruit minorities had increased over the license term. Church Ex. 3, p. 1; Church Ex. 4, Pp. 16-17; Tr. 326-29.

65. Because KFUE and KFUE-FM had generally publicized openings for much of the license term and had sent recruitment letters in July 1989 to at least ten local universities and personnel agencies stating that the stations encouraged minority applications and seeking help in recruiting minorities, Stortz added a sentence stating that KFUE and KFUE-FM "actively seek female and minority referrals," and attached a sample of a part of one of the letters. Stortz believed that the letters were evidence of the stations' then-current (i.e., July - September 1989) active efforts to recruit minorities and females. Church Ex. 4, p. 17.

66. Stortz knew that KFUE and KFUE-FM had certain job requirements, most significantly theological training, for certain positions. He did not believe, however, that this made the statement about recruitment policies misleading. The sentence stated that the stations sought out "qualified" minority and female applicants and Stortz believed that this was consistent with the stations' use of various employment criteria such as religious training or knowledge of classical music. Church Ex. 4, p. 18.

67. In Stortz's view, the Commission was well aware that the stations were licensed to a church and it therefore never occurred to him that the EEO Program Report needed to mention

that theological training was necessary for certain jobs. Since the Commission had not raised the point in connection with the 1982 renewal application, Stortz did not think that the various qualifications had to be listed. Instead, he believed the reference to "qualified" applicants would suffice. Similarly, it did not occur to Stortz that the stations needed to explicitly mention their arrangement with the Concordia Seminary because, again, in his view, the Commission was well aware that the stations had a connection to the Seminary, especially when KFUD had originally been licensed to the Seminary. Church Ex. 4, p. 18.

#### Classical Music Training

68. The Opposition, which the Church filed on February 23, 1990, includes the following statement:

Given the specialized nature of KFUD's formats, nearly all of the positions within KFUD's top four job categories can only be filled by persons who have either expertise in classical music (for KFUD-FM) or theological training in the doctrine of the Lutheran church (for KFUD-AM).

Church Ex. 4, Att. 7, p. 13. The Opposition also states:

Clearly nearly all of KFUD's employees must have specialized skills. However, relatively few minorities in St. Louis area possess these skills.

Church Ex. 4, Att. 7, p. 14. Finally, the Opposition makes the following assertion:

Similarly, KFUD is not aware of any specific statistics showing classical music training among members of

minority groups. However, one measure is the popularity of KFUD-FM (the only full-time classical music station in the area) among persons who are members of minority groups. In October and November 1988 (the most recent figures available to KFUD), only 3.7 percent of KFUD-FM's 72,800 listeners -- or 2,693 -- were black; 0 percent were Hispanic or Asian.<sup>6/</sup> This is approximately .1 percent of the population of the St. Louis Metropolitan Statistical Area. Figures as to persons in the labor market with classical music expertise -- as opposed to simply interest -- would, of course, be even lower.

Thus, KFUD's highly specialized employment needs make reliance upon overall minority labor force availability meaningless. In fact, there is but a small number of minority persons in the St. Louis SMSA -- or, for that matter, nationwide -- who possess the qualifications KFUD requires for nearly every job position at the station. By one estimate, only about .1 percent of the St. Louis population consists of members of minority groups with classical music training; roughly two percent of the population consists of members of minority groups with Lutheran theological training. KFUD's minority employment record must be considered in that context.

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<sup>6/</sup> Source: The Media Audit -- St. Louis, 1988  
International Demographics, Inc.

Church Ex. 4, Att. 7, Pp. 15-16.

69. In a Motion to Strike and Reply to Comments filed on September 21, 1992 ("Reply"), the Church characterized the statements in its Opposition as follows:

Finally, KFUD also explained that, for nearly all the employment positions at the stations, reliance upon general minority availability in St. Louis is an inappropriate standard by which to measure KFUD's performance. Because so many of its employees must possess either training in Lutheran theology or a classical music background, the actual availability of minorities in St. Louis with the requisite job skills is by definition far lower than the number of minorities overall in the St. Louis labor force, and

KFUO's performance must be judged in that context.  
(See KFUE Opposition to Petition to Deny at 7-10 and Table Two).<sup>2/</sup>

The NAACP's assertion that KFUE's minority employment levels were low simply ignores the facts discussed at length in KFUE's pleadings to date.

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<sup>2/</sup> In fact, putting aside for the moment those employment categories requiring these specialized skills (which issue is addressed further below), KFUE's employment statistics were anything but "extremely low." There were ten full-time hires made by the stations between October 1986 and January 31, 1990 (the period of time for which the FCC has requested data) in employment categories for which religious or musical background were not an overriding consideration; of these ten, four (or 40 percent) were black. (See KFUE's Opposition to Petition to Deny ("Opposition" at Table 3 (for hires between 10/1/86 and 10/1/89) and KFUE's May 12, 1990 response letter to Glenn A. Wolfe, at p. 6 (for hires between 11/1/89 and 1/31/90.)

MMB Ex. 11, Pp. 10-11. The Reply discussed this point further, stating:

C. Hiring of Persons with Specialized Skills

In its Opposition to Petition to Deny, KFUE explained that assessing KFUE's performance against general labor market minority availability statistics is misleading because this fails to account for the fact that nearly all of the full-time hiring opportunities which occurred at the stations during the license term required particular training either in classical music or Lutheran theology.<sup>5/</sup> Because of the self-evident proposition that there are fewer minorities in St. Louis with these special skills than there are minorities in St. Louis as a whole, KFUE suggested that it was inappropriate to assess its employment performance in light of census data for the entire minority population.

The NAACP takes issue with a number of related points. First, without any basis, it questions the veracity of KFUE's assertion that it is important that salespersons at KFUE-AM be knowledgeable about classical music.

The attached Statement of Dennis Stortz, General Manager of KFUE, provides further information on this

point. As Mr. Stortz points out, classical music stations have a difficult time competing commercially with stations featuring more popular formats, and it is critical that such stations take advantage of every opportunity to market themselves effectively. Despite the NAACP's assertion that it is unaware of cases where stations require their sales forces to be knowledgeable about station formats, Mr. Stortz (who is General Manager of a classical music station) advises that it is, in fact, standard practice for classical music stations. The desirability of attracting knowledgeable salespersons is a frequent topic at sales symposia at the Classical Music Broadcasters Association.

Second, the NAACP charges that KFUE had no basis for estimates it made concerning the number of minorities in the St. Louis area possessing expertise in classical music, a prerequisite for many of the positions at KFUE-FM. While KFUE conceded that specific data on this point probably do not exist, it did in fact provide a basis for availability estimates that it made -- namely, the numbers of minority persons in the St. Louis metro area who listen to KFUE-FM, the only classical music radio station in the city. That number was 2,693 -- about .1 percent of the population of the St. Louis Metropolitan Statistical Area.

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5/ Of the 35 full-time hires made from October 1, 1986 through January 31, 1990, 26 required either Lutheran theological background or classical music knowledge. (See KFUE Opposition at Table 3; Response at pp. 6-9).

MMB Ex. 11, Pp. 16-18. In an attached statement, Stortz declares, inter alia:

[W]e attempt to ensure that the KFUE-FM commercial salespeople are knowledgeable about our classical music format. It is a truism in the classical music station industry that clients who choose to advertise on classical music stations most often do so because they are themselves classical music fans knowledgeable about the format. A salesperson who is unable to discuss the format knowledgeably is at a serious disadvantage.

MMB Ex. 11, p. 23.

70. In a response to a Commission inquiry filed December

28, 1992 ("Response"), the Church stated:

B. KFUO-FM.

1. Musical Background for Salespeople.

a. Need for Musical Background.

The Commission has requested additional information concerning the requirement that KFUE-FM salespeople be knowledgeable about classical music. KFUE-FM enforces this requirement by making every effort to hire such persons whenever it can; it only employs salespeople who do not possess this expertise on those occasions when it is unable to secure suitable persons with the requisite classical music background.

MMB Ex. 14, p. 14. Later in the Response the Church makes reference to "descriptions KFUE has provided in filings made in this proceeding concerning the requirement that most employees at KFUE either be knowledgeable about Lutheran theology or possess some background in classical music." In that regard, the Response states:

KFUE had advised the Commission of these specialized employment needs in order to illustrate that the number of persons (both minority and non-minority) who possess the specialized skills required of certain employees at the stations is by definition far less than the number of persons in the labor force as a whole, and that it would therefore be inappropriate to compare KFUE's employee profile with the general labor force of the St. Louis SMSA. KFUE had suggested that, instead, the Commission compare KFUE's employee profile in certain job positions with statistics showing the availability of persons in the St. Louis labor force with the specific background required for these positions.

MMB Ex. 14, Pp. 31-32. Attached to the Response is the affidavit of Dennis Stortz. Stortz declares, inter alia:

We have not retained resumes for our former salespeople. I know from personal experience that a large number of our sales staff during the license term were knowledgeable about classical music, although not all were.

In my opinion, it is very important for salespeople at KFUE-FM to have as much knowledge about classical music as possible. This is important to many of our advertising clients, and is a prerequisite to carrying out many of the duties that our salespeople are responsible for, such as writing advertising for classical music in a substantive way. Our salespeople often develop advertising promotions or themes for a particular client account that are based upon a particular piece of music, or classical music theme, and which require knowledge about that music, even when the client is not a classical music entity. An example would be a recent promotion we did in which we broadcast advertising for a local French restaurant and featured music by several French composers. Our salespeople were responsible for developing and executing this promotion.

Our salespeople share my opinion that knowledge about classical music is necessary to function well as a salesperson at KFUE-FM. In fact, I have been asked by our Sales Manager whether KFUE would pay for coursework by our salespeople in classical music appreciation.

MMB Ex. 14, Pp. 61-62.

71. During the license term, Stortz and Devantier believed that it was essential or highly desirable for announcers and salespersons for KFUE-FM to be knowledgeable about classical music. Toward the end of the license term, their thinking evolved and they began to believe that general experience in sales was perhaps as or more important than knowledge of classical music as a qualification for KFUE-FM salespersons. Stortz and Devantier attribute their original belief to the fact that, between 1983 and 1986, KFUE-FM did not hire its own sales personnel but instead relied on an outside consultant, Concert Music Broadcast Sales ("CMBS"), to sell time to both national and local advertisers. The stations had both previously been



noncommercial and were still inching their way into a fully commercial culture. The KFUE-FM salesperson hired by CMBS was, in Stortz's judgment, knowledgeable about classical music. When it came time for KFUE-FM to hire its own initial sales manager, the station proceeded on the same premise, that people with knowledge of classical music would be the best salespersons because they would know their "product." This was consistent with the advice of CMBS, which was in the business of selling time on commercial classical music radio stations throughout the United States. Church Ex. 4, Pp. 9-10; Tr. 216-17, 873.

72. CMBS' founder and president, James Cleary, confirmed that he recommended to KFUE-FM management that in hiring sales staff they should hire people with a knowledge of classical music. He felt it was particularly important for KFUE-FM to have sales people with such knowledge because the station was marketing a new product to the St. Louis market. Therefore, he opined that KFUE-FM needed sales people who could "project the essence of KFUE-FM's format." Cleary also felt that people with classical music knowledge would be more "credible" to buyers. When KFUE-FM decided in 1986 to develop its own sales staff, Cleary noted, the station hired one of his staff, Jan Hutchinson, who had such knowledge. Church Ex. 5, Pp. 1-5; Tr. 215-16.

73. At times during the years between 1986 and 1989, the large turnover in the sales force and economic pressures forced

KFUO-FM to hire replacements quickly. Thus, there were instances in which the Church had to settle for people who had less knowledge about the "product" than it might ideally have liked. Nevertheless, classical music knowledge was considered a desirable trait for an applicant for a KFUE-FM sales position, and, providing everything else was equal, the station would select an individual with that knowledge, experience, or background. Church Ex. 4, p. 10; Tr. 818.

74. In the Church's view, the need for classical music knowledge for certain jobs did not in any way affect its willingness to recruit individuals of any race, color or creed. In fact, the Church states, no minority applicant was ever rejected for any position at KFUE-FM because he or she lacked knowledge of classical music. Church Ex. 4, Pp. 10, 16.

75. Shortly after the NAACP filed its Petition to Deny on January 2, 1990, Marcia Cranberg, the Church's communications counsel, asked Dennis Stortz whether there were any positions at the stations that required specialized skills or background. Stortz said there were, and the two discussed them and the reasons specialized skills were necessary. Tr. 990, 1020-22. On the basis of these discussions, Cranberg drafted the Opposition to Petition to Deny and Response to Inquiry, filed February 23, 1990, and Table Three thereof, which indicated which employees needed specialized skills. Tr. 1022.

76. Cranberg felt that the Commission should take into account the fact, among others, that a significant number of positions required specialized training. In Cranberg's view, relying on overall labor force numbers was not a precise way of measuring EEO performance by the stations and the Commission should consider alternative availability figures for positions that required specialized skills. Tr. 991-92. Although she told Stortz about it, it was Cranberg's idea to make the argument in an attempt to persuade the Commission not to rely on overall labor force data. Cranberg's firm, Arnold and Porter, had used such an argument in the past. Tr. 992, 1022-23.

77. In support of her argument, Cranberg used statistics about black listenership of KFUE-FM from Media Audit in St. Louis which were provided by the station. Tr. 1024-25. She considered the statistics useful because she believed that people with classical music expertise, background, or knowledge would listen to KFUE-FM, which was the only classical music station in the market. Tr. 1025-26.

78. Cranberg drafted the language in the Opposition about classical music training. Tr. 1033. Before filing the Opposition, Cranberg sent the Opposition to Stortz to review. Stortz was the only person at the Church who reviewed the document. Tr. 1032. Cranberg does not recall discussing with Stortz the specific language regarding classical music training

around the time of his review of the Opposition. Tr. 1033. Moreover, Cranberg has no recollection of the exact words used during her earlier discussion with Stortz about the need for classical music training. She believes, however, that her choice of words in the Opposition was based on her understanding that what she and Stortz were discussing was, indeed, a requirement. Tr. 1021.

79. The Opposition included an affidavit by Stortz attesting to the truth of the facts contained therein. When Stortz reviewed the Opposition he considered it factually accurate. He did not object to making the statement about classical music training requirements. He viewed it as a legal argument, not a factual one. Thus, he relied on Cranberg's judgment in making the argument. He understood the argument to involve the appropriate labor force statistics to use. In his opinion, the statement said nothing about KFUC-FM's willingness to recruit for and hire minority individuals. In any case, in Stortz's view, the station did have a requirement for classical music training at KFUC-FM. When that requirement was challenged, he wrote to Cranberg on September 17, 1992, stating:

While all of this information about classical music knowledge ... is true and applicable, I don't want it to sound like an excuse. It is what we do as radio stations, and there is no bent toward discrimination.

Stortz did not view Cranberg's argument as containing a misrepresentation, but rather as one that might offend minorities because of the suggestion that minorities might have less

classical music knowledge than non-minorities. Church Ex. 4, Pp. 9-11; Church Ex. 4, Att. 8; Tr. 1029-30, 1033.

80. When Cranberg learned that certain staff sales persons at KFUE-FM did not, in fact, have classical music training, she had Stortz prepare an affidavit addressing the classical music requirement. In his affidavit, Stortz stated that not every sales person hired by KFUE-FM had such training. A copy of Stortz's affidavit was submitted to the Commission in a Response filed on December 28, 1992. MMB Ex. 14; Tr. 1029-30. In Cranberg's view, the argument in the Opposition about reliance on alternative labor force availability is legitimate. Notwithstanding the fact that classical music knowledge was more of a desirable trait than an absolute requirement, it was still difficult for KFUE-FM to find prospective employees with that background. Tr. 1028.

#### Conclusions of Law

##### Section 73.2080 Issue

1. Section 73.2080(a) of the Commission's Rules specifies that; "[E]qual opportunity in employment shall be afforded by all licensees ... to all qualified persons and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin or sex." As a basis for

expanding the Section 73.2080(b) issue specified in the HDO to include a Section 73.2080(a) determination, the Presiding Judge cited the HDO's statement (at para. 26) "that substantial and material questions of fact exist as to whether the licensee's employment practices are discriminatory in violation of our EEO rule, Section 73.2080."

2. There is no evidence that, during the license term, the stations intentionally discriminated against any particular individual on the basis of that individual's race, color, religion, national origin or sex. While there is no evidence of intentional discrimination the Church did impose a requirement of knowledge of Synod doctrine and philosophies on every position at KFUE, with the sole exception of maintenance worker, and for those positions which served both KFUE and KFUE-FM. The employment application forms for both stations, up until April 26, 1989, clearly stated that "the Lutheran Church/Missouri Synod retains the right to give preference in the hiring of persons who are in good standing of an LCMS congregation," and sought information concerning applicants' religious affiliation. However, these application forms did not include a statement notifying applicants that the stations were equal opportunity employers.

3. In King's Garden Inc., 34 FCC 2d 937 (1972), aff'd 498 F. 2d 51 (D.C. Cir. 1972), the Commission stated that a station

licensed to a religious organization may discriminate on the basis of religion in its employment practices as to those hired to espouse the licensee's religious philosophy over the air. The Commission made clear in King's Garden, however, that it "does not see any reason for a broad interpretation that would permit discrimination in the employment of persons whose work is not connected with the espousal of the licensee's religious views." 34 FCC 2d at 938. In National Religious Broadcasters, Inc., 43 FCC 2d 451 (1973), the Commission stated that it would include under the King's Garden umbrella writers and research assistants hired for the preparation of programs espousing the licensee's religious views because they were connected with the espousal of those views. Similarly, the Commission exempted from its non-discrimination rules those hired to answer religious questions on a call-in program. The Commission, however, declined to exempt employees by job title. Thus, announcers and secretaries whose duties did not include the espousal of religious views were not held, per se, exempt by reason of their title.

4. The Church's requirement that secretary/receptionists, engineers and business managers have Lutheran training or be members of the Lutheran Church/Missouri Synod, does not comport with the Commission's holding in King's Garden. None of these positions has been shown to have anything to do with the on-air espousal of the licensee's religious views. Similarly, the contacting of Lutheran pastors by secretaries to schedule them

for appearances on the radio station did not involve the secretaries themselves in the espousal of religious views on the station. Moreover, it was usually the program director who made the decision as to who to invite to speak on the air, not secretaries. Also, engineers, who merely record Church services, and business managers, who communicate with Church headquarters, are not by reason of those functions exempt from the Commission's non-discrimination policy.

5. The plain fact is that the Church consistently and systematically violated the Commission policy established in King's Garden. The Church had absolutely no justification for attempting to limit station employment to persons with Lutheran training. Thus, it is concluded that, should the Presiding Judge otherwise determine that renewal of the licenses in this proceeding is in the public interest, he should require that KFUD establish a policy of non-discrimination in the hiring for non-exempt positions and supply a copy of such policy to the Commission's EEO Branch within three months of the effective date of his decision.

6. Section 73.2080(b) requires each broadcast station to "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice." Under the terms of such a program, a station must: (1) define



management responsibility for the policy's enforcement; (2) inform its employees and prospective employees of its policy; (3) communicate its employment policy and employment needs to non-discriminatory sources of qualified applicants; (4) conduct a continuing program to exclude unlawful discrimination and; (5) review its job structure and employment practices and adopt positive recruitment, job design and other measures to ensure genuine equal opportunity to participate fully in all organizational units, occupations and levels of opportunity.

7. Section 73.2080(c) states that a station's EEO program should "reasonably" address itself, to the extent possible and to the extent appropriate, to disseminating its EEO program to job applicants and current employees (Section 73.2080(c)(1)) and to using "minority organizations ... and other potential sources of minority and female applicants, to supply referrals whenever job vacancies are available in its operation." (Section 73.2080(c)(2)). Section 73.2080(c)(2) states that licensees may meet the requirement that minority recruitment sources be used by, for example, (1) placing advertisements in media that have significant circulation among minorities residing in the recruiting area; (2) recruiting through schools with significant minority enrollment; (3) contacting minority and human rights organizations to encourage the referral of qualified minority or female applicants; (4) encouraging current employees to refer qualified minority employees; or (5) making known to recruitment